PACIFICORP
LEGAL DEPARTMENT

MICHAEL G. JENKINS
Assistant General Counsel
801-220-2233
801-220-3299 (fax)
michael.jenkins@pacificorp.com

One Utah Center, 201 South Main, Suite 2200 Salt Lake City, Utah 84111

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Via E-Mail and Overnight Mail

Matthew D. Cohn
U.S. Environmental Protection Agency
Region VIII, 8ENF-L
999 18th Street, Suite 300
Denver, CO 80202-2466

Re: Vermiculite Intermountain Site, Salt Lake City, Utah

Dear Matt:

We appreciated the opportunity to meet with you earlier this month to discuss the information that we have assembled on the history of the Vermiculite Intermountain Site (the "Site") and to continue discussions with regard to the draft Administrative Order on Consent. As to the draft AOC, we are pleased that you have accepted a few of our proposed changes. We realize, of course, that a number of issues still remain in order to finalize the AOC before PacifiCorp can begin cleanup activities. We are hopeful these can be resolved over the next few weeks.

This letter is to provide you with PacifiCorp's comments to the Third Draft Administrative Order on Consent for Removal Action dated April 8, 2004.

1. PacifiCorp Property. The AOC is inconsistent in its use of the defined term "PacifiCorp Property." For example, in paragraph 8, last subparagraph (not yet numbered), that property is called the "Utah Power & Light Substation." The interplay between "Site," "Facility" and "PacifiCorp Property" should also be carefully reviewed throughout the document.

2. Findings of Fact. PacifiCorp recognizes that the factual statements in Section IV are *EPA's* findings of fact stated for the purposes expressed in the AOC. Still, PacifiCorp has an interest in the findings of fact not being incorrect, overstated, or otherwise unsupported. Toward that end:

A. PacifiCorp strongly objects to the second and sixth subparagraphs under paragraph 8, because they suggest that the exfoliation facility operated from 1944

to 1954 on property then owned by PacifiCorp's predecessor. This seems to be more speculation than fact. Moreover, this speculation is directly contradicted by the information we have made available to you. At most, one can deduce from available information that vermiculite was shipped somewhere on behalf of Vermiculite Intermountain (via Utah Lumber) between 1944 and 1954, but the exact location of those shipments is not known. If the shipments went to the city block where Utah Lumber and Vermiculite Intermountain facilities were located, one might further presume that storage and distribution operations occurred somewhere on that block in connection with those shipments. Even if these assumptions are accepted as fact, we have demonstrated quite clearly that the vermiculite *exfoliation* operations (those that apparently resulted in air emissions) did not begin until 1954. The evidence we provided further shows that those operations discontinued in 1984. It also shows that PacifiCorp's predecessor sold the property in 1954 prior to commencement of the exfoliation operations and then re-acquired the property the same year that operations ceased. We know this is different from the presumption EPA has been operating under, but the electronic data summaries that you referenced as evidence at our prior meeting cannot discount the lengthy and detailed historical information that we have presented to you. The findings of fact should reflect facts, not speculation.

B. PacifiCorp objects to the way the findings express the relative exposure risks for respirable asbestos fibers. Specifically, PacifiCorp takes issue with EPA's use of the subjective and highly qualitative phrase "high levels" in the third, fourth, and seventh subparagraphs under 8. For example, the representation in subparagraph 4 that "disturbance of dust or soils containing the amphibole asbestos from Libby vermiculite produces high levels of respirable airborne asbestos fibers" is clearly overstated. Regardless of how one defines "high levels," it is clear that only disturbance of dust or soils that themselves contain *high levels* of asbestos could result in "high levels" of respirable airborne asbestos fibers. This is important because EPA's sampling at the PacifiCorp Property has shown that asbestos concentrations in the dust and soil there runs under one percent. PacifiCorp disagrees with the inference that disturbance of dust or soils on the PacifiCorp Property results in "high levels" of respirable airborne asbestos fibers. The references to "high levels" must be deleted or modified to be supportable (such as "measurable quantities"). Similarly, PacifiCorp takes issue with the overstated causation statement in the fifth subparagraph. This statement suggests that anyone exposed to Libby vermiculite necessarily contracts asbestos-related diseases. If this were true, every person in Libby would be sick. Rather, human exposure to Libby vermiculite may be, or appears to be, a contributing factor to asbestos-related diseases.

3. Conclusions of Law. For the reasons set forth under item 2 above, PacifiCorp strongly disputes the conclusion of law set forth in paragraph 9.d.ii that PacifiCorp qualifies as an owner or operator at the time of disposal of hazardous substances. It is sufficient for purposes of the Order to conclude that PacifiCorp qualifies as a current owner and operator of the *PacifiCorp Property*, which constitutes a portion of the Site. This conclusion also squares with the property history information we have provided to you. Also, PacifiCorp is not the owner or operator of "the facility" as stated in paragraph 9.d.i but only a portion of the Site, defined as the "PacifiCorp Property." We would prefer clarifying this language, to the effect that PacifiCorp is the current owner of the

PacifiCorp Property, which constitutes a portion of the Site. This still gives EPA the jurisdictional hook that it needs and more accurately portrays the factual circumstances.

4. David Wilson. For purposes of paragraph 10.x., Mr. Wilson's cell number is (503) 860-2307.

5. Approval of Work Plans. Paragraph 15 has been modified to state that PacifiCorp will perform all actions necessary to implement the "Work as set forth in the Work Plans, which have been approved by EPA." We assume this language means that EPA anticipates that it will have already approved the Work Plans prior to execution of the AOC. If so, this is consistent with PacifiCorp's intent. In that case, we assume that we will execute the AOC after EPA has accepted the Work Plans. Please advise if your intention is different.

6. Access. PacifiCorp remains concerned about the scope of EPA's access provision (paragraph 22) in light of the overriding worker safety and operational concerns at the substation facility. In this respect, PacifiCorp cannot conceive of any possible environmental-related "imminent emergency" at this particular site that would present sufficient exigencies to supercede the electricity-related health and safety requirements (notice to PacifiCorp, training, and presence of PacifiCorp personnel). We hope you will understand that PacifiCorp is not in any position to agree to any exceptions to the access requirements. For the same reasons, PacifiCorp cannot approve of the language in subparagraph c that EPA would "seek the participation of" one or more PacifiCorp employees. Rather, EPA *must* be accompanied by such PacifiCorp personnel. Also, PacifiCorp's substation journeymen are not 40-hour trained, and considering their role at the Site, need not be so trained. Thus, PacifiCorp cannot accept such a condition. Under subparagraph b, the PPE requirements will be set forth in the Health and Safety Plan (not the Work Plan).

7. Off-Site Access. PacifiCorp again requests that EPA delete the references to payment of consideration to obtain access from contiguous property owners (paragraph 23). While this provision is consistent with the model, EPA has discretion to delete the requirement for payment of consideration. As a practical matter, this provision is not helpful. To the contrary, the existence of an express contractual obligation to pay for access, in our experience, provides uncooperative property owners with a basis to hold out for money when they otherwise would have provided access. While we do not anticipate having significant access issues at this Site, we would prefer to work cooperatively with EPA, as necessary, to obtain any third-party access that may be necessary.

8. Record Retention. PacifiCorp continues to object to the requirements of paragraph 30. The substantial administrative burden to provide the requisite notices after seven years have elapsed, at a site of this nature, is entirely unnecessary. We ask again that EPA delete this requirement.

9. Notice of Releases. The provisions of paragraph 34 are cumulative of the duties set forth in paragraph 33, not to mention Section 103(c) of CERCLA. At a site of this nature, the contractual requirements of paragraph 34 are unnecessary and should be omitted.

10. Interest. As paragraph 38 is worded, it appears that interest will accrue during the 30-day payment period, even if the bill is paid on time. We do not believe this is EPA's intent. Moreover, in the event of a dispute under paragraph 39, the undisputed amount will be paid and the disputed amount will be paid into an interest-bearing account. As paragraphs 38 and 39 are worded, EPA will obtain *double* recovery of interest in the event of a dispute. The payment of disputed amounts into an interest-bearing account should toll the contractual interest obligation.

11. Stipulated Penalty Amounts. PacifiCorp recognizes that Region VIII has reduced the amount of stipulated penalties (paragraph 47) for the 1st through 30th days, but retained the $32,500 daily amount for periods 31 days and beyond (paragraph 47). We can accept the amounts for days 1 through 30 (even though they are substantially higher than our proposal), but only if the amounts for days 31 and beyond are reduced. EPA retains substantial discretion in setting the amount of stipulated penalties and PacifiCorp asks that this amount be reduced to $10,000. Given our reputation for cooperating with EPA and other regulatory agencies to get cleanup work done within required timeframes, we believe this reduction is appropriate.

12. Stipulated Penalties for Work Takeover. Matt, this provision (paragraph 49) raises a very important point for us, as you can imagine. PacifiCorp is stepping up to an estimated amount of nearly one million dollars to cleanup our current substation property--all because of processing activities that took place on nearby property during a time that we did not own that property. In addition to this substantial commitment, we have a hard time with the notion of also agreeing to pay EPA hundreds of thousands of dollars in the event of an EPA work takeover. This arrangement is, to us, an excessive and unnecessary guarantee. PacifiCorp's primary objection is that this provision is entirely punitive in nature, since EPA, in any event, reserves the right to charge PacifiCorp for work it performs in a takeover situation. PacifiCorp is a multi-billion dollar electric utility company with deep and historic ties to Salt Lake City and to the 3rd West Substation; we're not going anywhere. There is no threat to EPA that PacifiCorp will try to skip out of its AOC obligations. Not only does this arrangement potentially result in multiple recovery of costs, but once triggered also applies to "any portion" of the Work, without qualification or limitation. Thus, in the extreme, EPA could recover a flat $600,000 for performing $1 worth of work. This provision must be removed.

13. Accrual of Stipulated Penalties. Turning to paragraph 50, stipulated penalties continue to accrue for a period of 31 days even after submission of a deliverable later determined by EPA to be defective and 21 days after commencement of the Negotiation Period. PacifiCorp understands that the 31 and 21 day accruals are from the model, but requests that EPA exercise its discretion to delete these accrual periods so that penalties stop accruing upon submission of a deliverable and upon commencement of the Negotiation Period.

14. Covenant Not to Sue and Reservations by EPA. Recognizing that these provisions (paragraphs 56 through 58) are based on model language, PacifiCorp nevertheless objects because the covenant not to sue, when read in light of the reservations, is illusory. The covenant not to sue extends only to the Work and to Future Response Costs. EPA reserves all rights as to other response actions not defined as the Work. Keep in mind that PacifiCorp is undertaking to perform and finance the Work and

to pay for all Future Response Costs. Thus, the release is limited to the actual work performed and costs paid by PacifiCorp. Yet, PacifiCorp's direct performance of such work and payment of such costs by definition forecloses the possibility, in the first instance, of EPA having any claims in that respect. EPA gives up nothing; PacifiCorp gains nothing. This provision thus confers little if any material benefit upon PacifiCorp.

PacifiCorp continues to request that EPA provide a covenant not to sue for the entire site once PacifiCorp has completed the work on the PacifiCorp Property. This was the preference we expressed to you at our prior meeting. Under the circumstances, and given the information we have provided about other PRPs, this position seems to make sense and is fair to all concerned. I believe you stated that you would run this proposal up your management chain. If you already have done that, then perhaps we can have some discussion about why EPA thinks a broad covenant is not appropriate in these circumstances.

15. Contribution Protection. While based on the model form, the contribution protection provision (paragraph 67) is also illusory. While the statute provides for contribution protection for "matters addressed" in the AOC, the draft AOC specifically defines "matters addressed" as the Work and Future Response Costs. As discussed in comment 14, above, PacifiCorp is undertaking to perform and finance the Work and to pay for all Future Response Costs. Thus, there is no reasonable possibility of any third party having any claims against PacifiCorp arising from or relating to the Work or Future Response Costs in the first instance. As a result, the contribution protection provision does not provide PacifiCorp with any material benefit. PacifiCorp requests that the scope of the contribution protection be extended to all costs related to vermiculite contamination at the entire site (consistent with our preference under comment 14 above).

16. Modifications and Additional Removal Actions. PacifiCorp understands that Sections XXVII MODIFICATIONS and XXVIII ADDITIONAL REMOVAL ACTION are from the model order (paragraphs 76 through 79). PacifiCorp is concerned that, reading these provisions together, EPA may enjoy the unilateral and unqualified right to compel PacifiCorp to perform whatever additional work that EPA desires. With respect to Section XXVI, modifications to the Work Plan or other deliverables must be limited to modifications that are consistent with the existing Action Memorandum. Section XXVIII should be clarified to state that, while EPA reserves rights to determine that additional actions may be necessary, this provision must not be read as binding PacifiCorp to implement such additional work.

17. Miscellaneous Corrections. We noted the following typographical errors: "attachements" in Paragraph 15, and "thirth" in 23.x. (just above paragraph 24). Also, a number of brackets (from the model document) still appear in the last draft. These will need to be deleted, along with some language that is inapplicable (such as waiver of rights against *de micromis* parties).

PacifiCorp remains committed to assume responsibility for and to perform an appropriate and timely removal action with respect to the substation property it currently owns within the Site, within the schedule anticipated in your letter. We request that you

incorporate the above comments into a Fourth Draft of the AOC. If necessary, we can meet and discuss any remaining issues at that point.

Thanks again for your consideration of our comments.

Very truly yours,

Michael G. Jenkins

cc: David Wilson
Jeff Tucker